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ARTICLES

Justice Jackson at Nuremberg

In an action unprecedented in the history of the Supreme Court of the United States, Associate Justice Robert H. Jackson took leave of the Court, pursuant to an Executive Order of May 8, 1945, to accept the appointment by President Harry Truman

> as the Representative of the United States and as its Chief of Counsel in preparing and prosecuting charges of atrocities and war crimes against such of the leaders of the European Axis powers and their principal agents and accessories as the United States may agree with any of the United Nations to bring to trial before an international military tribunal.[1]

Thus began a period of agonizing effort and scintillating achievement that caused Justice Jackson to conclude in 1954 that ". . . the hard months at Nuremberg were well spent in the most important, enduring, and constructive work of my life."[2]

It is appropriate at this fortieth anniversary of the judgment of the International Military Tribunal to review the monumental contribution to the international law of crimes which Justice Jackson, and those associated with him at Nuremberg, made during the year and a half of intensive work which culminated in the Tribunal's decision of October 1, 1946. The proceedings at Nuremberg, which brought before the bar of international justice the leaders of the Nazi regime, elevated law over force in seeking retribution for Nazi crimes, established an irrefutable record of the evils of Nazism, and laid the basis for a law-ordered world society by the declaration of principles of law applicable to future aggressors.

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1. Exec. Order No. 9547, 10 Fed. Reg. 4961.
2. Jackson, *Forward* to W. HARRIS, TYRANNY ON TRIAL at xxxvii (1954).

I. Negotiations and Consummation of the London Agreement

A. Yalta Memorandum

World War II began on September 1, 1939 when German armed forces, under orders of Adolf Hitler, Fuehrer of the Third Reich, smashed into Poland. It ended on May 8, 1945 with the unconditional surrender of Germany by Hitler's successor, Admiral Karl Doenitz. In this period of five and one-half years, twenty-five million soldiers and civilians were killed, millions more were maimed and injured, six million Jews and other minorities were murdered or died in concentration and labor camps, cities were bombed and burned, and vast quantities of property were destroyed. The staggering cost of Hitler's evil ambitions, supported and abetted by his allies and accomplices, cried out for retribution.

On October 30, 1943, President Franklin Roosevelt, Prime Minister Winston Churchill, and Premier Joseph Stalin declared in the Moscow Declaration[3] that German officers and men and members of the Nazi Party who were responsible for or took a consenting part in atrocities, massacres, or executions would be sent back to the countries in which their deeds had been committed in order that they might be judged and punished according to the laws of the liberated countries, and that others, whose offenses had no particular geographical locations, would be punished by joint decision of the governments of the Allies. But no decision was reached as to whether such offenders would be punished by executive action or pursuant to judicial process.

In Britain, Lord Chancellor Simon and Prime Minister Churchill were of the opinion that leading war criminals should be disposed of by executive action, a view echoed in the United States by Secretary of the Treasury Henry Morgenthau who proposed to President Roosevelt on September 6, 1944 that German archcriminals should be shot upon capture and identification.

Secretary Morgenthau was opposed in the Cabinet by Secretary of War Henry L. Stimson, who believed that leading Nazis should be brought to trial before an international military tribunal and whose views ultimately prevailed in the United States. On January 22, 1945, a memorandum initialed by Stimson, as Secretary of War, Edward R. Stettinius, Jr., as Secretary of State, and Francis Biddle, as Attorney General, was presented to President Roosevelt as an aide-memoire in discussions on the punishment of Nazi war criminals at the forthcoming Yalta conference in

3. *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, U.S. Dep't of State Pub. No. 3080 at 12 (1949). Hereinafter cited as *ICMT*.

the Crimea. This "Yalta Memorandum" urged use of the judicial method against Nazi leaders:

> Condemnation of these criminals after a trial . . . would command maximum public support in our own times and receive the respect of history. The use of the judicial method will, in addition, make available for all mankind to study in future years an authentic record of Nazi crimes and criminality.[4]

After the Yalta conference, President Roosevelt sent Judge Samuel Rosenman to Europe as his personal representative to obtain the agreement of the United Kingdom for the trial of war criminals in general conformity with the Yalta Memorandum. He was unable to persuade the British to the American position, and was still in Europe when, on April 12, 1945, President Roosevelt died at Warm Springs, Georgia. Upon his return to the United States, Judge Rosenman was retained at this assignment by President Harry Truman.

B. Jackson Enters

On April 13, Justice Robert H. Jackson delivered an address to the American Society of International Law in which he declared his personal support for the public trial of alleged war criminals, concluding with the following caveat:

> The ultimate principle is that you must put no man on trial under the form of judicial proceedings, if you are not willing to see him freed if not proved guilty. If you are determined to execute a man in any case, there is no occasion for a trial. The world yields no respect to courts that are merely organized to convict.[5]

A few days after his speech, Justice Jackson received a call from Judge Rosenman inquiring whether he would consider accepting the role of chief prosecutor for the United States in a trial of the leading Nazi war criminals. Justice Jackson responded to the inquiry by a memorandum to the President of April 29 in which he declared his willingness to prepare and present the case against war criminals to a United Nations military tribunal within the general framework of the Yalta Memorandum. He stressed the importance of proceeding promptly, suggesting that to some extent "perfection" might be sacrificed to "expedition." Justice Jackson thought that the assignment might lead to his handling of the case on behalf of all the United Nations, but he emphasized the importance of undertaking at once his representation of the United States. The 1944-45 term of the Supreme Court was drawing to a close, and Justice Jackson believed that he could undertake this special assignment without prejudice to his judicial obli-

4. *ICMT*, at 6.
5. 10 Am. Soc'y Int'l L. Proc. at 18 (1945).

gations. As it turned out, this service to his country kept him from the 1945-46 term of the Court, and his absence may have cost him the Chief Justiceship.

C. Responsibilities of the Chief Counsel

The task facing Justice Jackson upon receiving his official assignment as United States Chief of Counsel on May 8, 1945, was staggering. To bring to justice the leaders of the European Axis, he had to: obtain the agreement of the Allies to a military trial; negotiate with them the organization, jurisdiction, and procedure of the tribunal; join with them in the identification of the persons to be accused and to prepare suitable indictments; find a site for the trial, see to the availability of a courtroom, prison and other facilities for the trial; supervise the housing and feeding of lawyers and others participating in the trial; and find the members of his legal staff and personally conduct and direct the prosecution of the case on behalf of the United States. With characteristic drive and enthusiasm, Justice Jackson set about promptly to overcome all obstacles and achieve a fair trial of the hated leaders of Nazi Germany.

To gain the support of the Allies for the trial, Justice Jackson left for Europe on May 22. On the plane, he met M. Georges Bidault, and discussed plans for the trial with the French Foreign Minister. In Paris he gained the promise of logistical and evidentiary support from General Dwight D. Eisenhower and other American military leaders. He found it necessary to use all of his persuasive powers in London to obtain the agreement of Lord Chancellor Simon, Foreign Secretary Eden, and Attorney General Maxwell-Fyfe to a judicial proceeding.

D. Issues before the London Conference

On June 3, 1945, two days after Justice Jackson returned to Washington, the British Ambassador informed the State Department that his Majesty's government had accepted in principle the American proposal as a basis for discussion by the representatives of the Allied governments. The United States, France, and the Soviet Union were invited to send representatives to London for conferences that were to begin on or about June 25. The United States accepted at once, and Justice Jackson returned to London on June 19 with the nucleus of his staff.

The first formal meeting of negotiators took place in London on June 26, 1945. Prime Minister Churchill had appointed his Attorney General, Sir David Maxwell-Fyfe, as the British representative. The Soviets were represented by General I. T. Nikitchenko, Vice-President of the Supreme Court of the Soviet Union, and Professor A. N. Trainin. The French representatives were Judge Robert Falco and Professor Andre Gros. While

the American proposal formed the basis of the discussions, there was so much opposition to many of its basic concepts as to have caused Justice Jackson, on more than one occasion, to despair of arriving at a consensus for trial. Apart from the many technical considerations, such as the number of members of the tribunal, quorums for conviction and sentence, authority of prosecuting staffs, rights of the accused, conduct of the trial, judgment and sentences, there were five basic controverted issues, the loss of any one of which would have gone far to invalidate or trivialize the trial.

1. *Trial of Guilt or Punishment*

Almost at the outset of the negotiations the first issue arose as to whether the trial was to be for the purpose of determining guilt or innocence of the accused or was to serve merely to assess the punishment which they were to suffer. General Nikitchenko, the Soviet representative, presented the latter position in these words:

> We are not dealing here with the usual type of case where it is a question of robbery, or murder, or petty offenses. We are dealing here with the chief war criminals who have already been convicted and whose conviction has been already announced by both the Moscow and Crimea declarations by the heads of the governments, and those declarations both declare to carry out immediately just punishment for the offenses which have been committed. . . . At the time when the declaration was made by the leaders of the United Nations on the question that the chief criminals should be tried, it was not certain whether these criminals would actually be tried by a court or would be punished by some purely political action. That is to say, they might have been dealt with by means other than a trial. Since then it has been decided that they shall go through a process of trial, but the object of that trial is, of course, the punishment of the criminals, and therefore the role of the prosecutor should be merely a role of assisting the court in the actual cases. . . . The whole idea is to secure quick and just punishment for the crime.[6]

This statement, made so candidly by the Soviet representative, if unanswered, would have discredited the proposed trial. On the afternoon of that day, Justice Jackson replied to General Nikitchenko in the following words:

> I think we are in a philosophical difference that lies at the root of a great many technical differences and will continue to lie at the root of differences unless we can reconcile our basic viewpoints. As the statement of our Soviet colleague said, they proceed on the assumption that the declarations of Crimea and Moscow already convict these parties and that the charges need not be tried before independent judges empowered to render an independent decision on guilt. Now that underlies a great deal of their position, and we don't make that assumption. In the first place, the President of the United Sates has no power to convict

6. *ICMT, supra* note 3, at 104–106.

> anybody. He can only accuse. He cannot arrest in most cases without judicial authority. Therefore, the accusation made carries no weight in an American trial whatever. These declarations are an accusation and not a conviction. That requires a judicial finding. Now we could not be parties to setting up a mere formal judicial body to ratify a political decision to convict. The judges will have to inquire into the evidence and reach an independent decision. . . . I have no sympathy with these men, but if we are going to have a trial then it must be an actual trial.[7]

Although the Soviet delegate did not recant his personal view that the purpose of the trial was to assess punishment rather than to determine guilt or innocence, he gained no support from the other representatives. The Charter of the Tribunal specified that the Tribunal should adjudge the guilt or *innocence* of any defendant. And, in fact, the Tribunal (subject solely to Soviet dissents) ultimately acquitted three of the individual defendants.

2. *Aggression: A Crime?*

A second fundamental issue was whether the initiating of aggressive war, in general, should be charged as criminal, or whether aggression should be restricted to acts in violation of specific treaties, agreements, or assurances. Obtaining a judicial declaration that the waging of aggressive war is a crime in international law was to Justice Jackson an issue of such supreme importance that he would have foregone the trial rather than to surrender this principle. Other representatives were less concerned since in every instance Hitler's aggressions had violated specific treaties, agreements, or assurances. Moreover, the charge against heads of state of waging aggressive war was unique in international law and, to the French, at least, carried the opprobrium of *ex post facto* legislation.

In opposing the inclusion of the charge of waging aggressive war as a crime, Professor Gros likened the Nazi leaders to bandits, whose depredations are wholly outside the law, and not to heads of state for whom international law has established codes of conduct. He declared that "the Americans want to win the trial on the ground that the Nazi war was illegal, and the French people and other people of the occupied countries just want to show that the Nazis were bandits."[8]

Justice Jackson insisted that, ex post facto *velnon*, the issue of the criminality of heads of state who initiate wars of aggression should be adjudicated in this international proceeding:

> Germany did not attack or invade the United States in violation of any treaty with us. The thing that led us to take sides in this war was that we regarded

7. *Id.* at 115.
8. *Id.* at 382.

> Germany's resort to war as illegal from its outset,[9] as an illegitimate attack on the international peace and order. . . . No one excuses Germany for launching a war of aggression because she had grievances, for we do not intend entering into a trial of whether she had grievances. If she had real grievances, an attack on the peace of the world was not her remedy. Now we come to the end and have crushed her aggression, and we do want to show that this war was an illegal plan of aggression. We want this group of nations to stand up and say . . . that launching a war of aggression is a crime and that no political or economic situation can justify it.[10]

His argument prevailed, and in the final draft of the Charter "the planning, preparation, initiation, or waging of a war of aggression," was declared criminal, as well as "a war in violation of international treaties, agreements, or assurances."[11] In its Judgment, the Tribunal held "that certain of the defendants planned and waged aggressive wars against twelve nations, and were therefore guilty of this series of crimes."[12] And the Tribunal concluded that it was unnecessary "to consider at any length the extent to which these aggressive wars were also 'wars in violation of international treaties, agreements, or assurances.' "[13] The Tribunal observed that "the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice,"[14] and held that the maxim was not violated by the Charter definition of aggressive war in view of the General Treaty for the Renunciation of War of August 27, 1928 (the Kellogg-Briand Pact) and other international declarations that aggressive war is an international crime. The Tribunal declared:

> War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[15]

3. *Aggression: Restricted to the European Axis?*

A third critical issue in the London negotiations arose over the scope of the judgment and its relevance and applicability, especially in relation to the charge of aggressive war, to other nations and individuals, including those sponsoring the charges against Nazi leaders. Might such legal concepts come back to haunt the victors of World War II? The Soviet ne-

9. Germany declared war on the United States on December 11, 1941. Justice Jackson was referring to American support of the Allies prior to that date.

10. *ICMT, supra* note 3, at 383–84.

11. INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS, I at 11 (1947) [hereinafter cited as *TMWC*].

12. *Id.* at 216.

13. *Id.*

14. *Id.* at 219.

15. *Id.* at 186.

gotiators, apprehensive of the judgment of world public opinion upon their own aggressions against Finland and Poland, consistently contended that any definition of crimes against peace should be restricted to aggressive acts committed by the European Axis. As late in the negotiations as July 23, they presented a draft definition of the crimes which were to be within the jurisdiction of the Tribunal in which aggressive war was defined as "aggression against or domination over other nations carried out by the European Axis in violation of the principles of international law and treaties."[16] In response to this proposal, Justice Jackson commented:

> We would think that had no place in any definition because it makes an entirely partisan declaration of law. If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us. Therefore, we think the clause 'carried out by the European Axis' so qualifies that statement that it deprives it of all standing and fairness as a juridical principle.[17]

The Soviet representatives nevertheless persisted in their determination to limit the definition of aggressive war to aggression committed by the Axis powers. At the meeting of July 25, General Nikitchenko asked: "Is it supposed then to condemn aggression or initiation of war in general or to condemn specifically aggression started by the Nazis in this war? If the attempt is to have a general definition, that would not be agreeable."[18]

The dispute was finally resolved on the last day of the negotiations by using general definitions of crimes while limiting the jurisdiction of the International Military Tribunal to the trial of the major war criminals "of the European Axis." The result was that the Charter did state basic principles of international law binding upon all signatories, but restricted the jurisdiction of the Tribunal to the trial of the alleged major war criminals of the Axis powers.

4. *Scope of Proof at Trial: A Conspiracy to Commit Aggression?*

A fourth controverted issue, pertaining to the scope of the proofs to be offered in the trial, was raised by the American proposal that there be included, as a separate crime, a common plan or conspiracy to commit aggression, war crimes and crimes against humanity. Although the concept of criminal conspiracy, as a distinct crime, was not familiar to lawyers trained in civil law, the alleged common plan was fundamental to the

16. *ICMT, supra* note 3, at 11.
17. *Id.* at 330.
18. *Id.* at 387.

American proposal since it supplied the basis for proof of the entire story of Nazism, including the prewar period. To Justice Jackson, the conviction of individuals was less important than establishing incontrovertible historical proof of the Nazi tyranny. Without this charge, evidence in the case would have been restricted to the war years. Justice Jackson was determined that there should be no such limitation. He was successful in obtaining the inclusion of a charge of participation in a common plan or conspiracy in the definition of crimes against peace, and the further statement that "leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."[19]

This language of the Charter was deemed sufficient to support, as Count One, the Common Plan or Conspiracy to commit all of the crimes charged to the defendants. Since proof of this count was assumed by the American prosecution staff, Justice Jackson was able to offer evidence to the Tribunal on the full scope of the Nazi tyranny, from its inception with the declaration of the twenty-five points of the German Workers' Party, proclaimed by Adolf Hitler in Munich on February 24, 1920, to the unconditional surrender of Germany by Admiral Karl Doenitz on May 8, 1945.

In its Judgment, the Tribunal held that a common plan to wage aggressive war existed as early as November 5, 1937, when Hitler first disclosed to his immediate associates his intention to expand German boundaries by force of arms, but the Tribunal did not find in the Charter a sufficient basis to sustain a separate charge of conspiracy to commit war crimes and crimes against humanity. Nonetheless, the Charter language which Justice Jackson had obtained enabled the American prosecution staff to place into the record the comprehensive proofs of Nazi criminality.

5. *Extension of Judicial Process to All "Active" Nazi Participants*

The fifth, and final, major issue of the negotiations arose over the extent of the use of the judicial process against persons involved in the commission of crimes defined in the Charter. While it was never contemplated that there would be mass trials of individuals before international courts, it was considered essential by Justice Jackson that those lesser persons who had actively participated in the Hitler regime should be held accountable for their criminal acts. The American plan contemplated naming the principal repressive agencies of the Third Reich as criminal organi-

19. *TMWC*, *supra* note 11, at 11.

zations. In subsequent trials of individual members before occupation tribunals the fact of the criminality of the organization would already have been judicially established. By this means the judgment of the international tribunal could facilitate the eradication of National Socialism from the German experience.

This concept of the criminality of organizations was troublesome to the French and Soviet negotiators. General Nikitchenko considered the proposal to be unnecessary and contended that the criminality of the Nazi system, including its various divisions and organizations, had already been decided by the heads of state at the Moscow and Crimea conferences. The French opposed the proposal as without precedent in civil law, and even the British entertained doubt as to the wisdom of naming organizations as defendants before the Tribunal. But Justice Jackson persevered and, in its final form, the Charter provided that at the trial of any individual member of any group or organization, the Tribunal could declare that group or organization to be criminal. It its Judgment the Tribunal held that membership alone in criminal organizations would not be sufficient to establish the criminality of a member; and it excluded persons who had no knowledge of the criminal purposes or acts of the organization, or who were drafted into membership, unless they were personally implicated in criminal acts.

E. The London Agreement

Objections of the negotiators having been reconciled, the London Agreement was adopted on August 8, 1945, establishing an International Military Tribunal for the trial of war criminals whose offenses had no particular geographical location. The constitution, jurisdiction, and functions of the Tribunal were set out in the Charter annexed to the Agreement. Provision was made for other governments of the United Nations to adhere to the Agreement, and by the date judgment was handed down nineteen such nations had expressed their adherence.[20]

The Charter created the International Military Tribunal for the just and prompt trial and punishment of the major war criminals of the European Axis. The Tribunal was to consist of four members, each with an alternate. One member and one alternate were to be appointed by each of the original signatories. The presence of all four members, or the alternate for any absent member, was necessary to constitute a quorum. Decisions were to be by majority vote, with the vote of the president, chosen by the

20. The nineteen countries were: Greece, Denmark, Yugoslavia, The Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay, Paraguay. I *TMWC* at 9.

members of the Tribunal, deciding in case of ties, except that convictions and sentences required affirmative votes of at least three members.

Three categories of crimes were declared to be within the jurisdiction of the Tribunal: *Crimes Against Peace*—initiating and waging wars of aggression, or in violation of treaties, or conspiracy to that end; *War Crimes*—violations of the laws or customs of war; and *Crimes Against Humanity*—extermination or other inhumane treatment of civilian populations in connection with other crimes within the jurisdiction of the Tribunal. Accomplices were declared responsible for all acts performed by any persons in execution of a common plan or conspiracy to commit the crimes so specified. The holding of a high governmental office could not excuse liability or mitigate punishment. Acting pursuant to superior orders could not excuse liability but might be heard in mitigation of punishment.

Successful conclusion of the negotiations for the London Agreement was a personal triumph for Justice Jackson. All basic provisions of the American plan had been incorporated in the final draft of the Charter which was binding upon the Tribunal and provided the jurisdictional basis for the Judgment. As the Tribunal declared:

> The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.[21]

II. Preparations for Trial and Opening Speech

A. Locations and Participants

The seat of the Tribunal was fixed at Berlin, and it was there that the British member, Lord Geoffrey Lawrence, was elected president of the Tribunal. The British alternate was Justice Norman Birkett. The American judge was Francis Biddle, one of the signers of the Yalta Memorandum, and the alternate was Judge John J. Parker. The French judge was Professor Donnedieu de Vabres, and the alternate was Judge Robert Falco, who had been a French delegate to the London negotiations. The Soviet

21. "Robert Jackson's tireless energy and skill had finally brought the four nations together—a really extraordinary feat." F. Biddle, In Brief Authority at 383 (1962). Gordon Dean declared that more than any other man Justice Jackson "was responsible for formulating the legal philosophy of the trial, as expressed in the Charter." A.B.A.J. at 913 (Oct. 1955).

judge was General I. T. Nikitchenko, likewise a delegate at London, and the alternate was Colonel A. F. Volchkov.

Nuremberg was selected as the site of the trial, despite having been virtually demolished by Allied bombing and artillery fire, principally because of the availability in the suburb of Furth of the Palace of Justice with an adjoining prison. Since Nuremberg was in the American Zone of Occupation it became the responsibility of the Americans, under the direction of Justice Jackson, to prepare the site and make the necessary physical arrangements for the trial. A courtroom was constructed within the damaged courthouse, and facilities were provided for the Tribunal, prosecution and defense counsel, and their staffs. A document center was established and translations made of hundreds of captured documents. In order that the proceedings could be understood in the several languages of the participating nations and the witnesses, an instantaneous translation system was installed. Headphones were provided with controls enabling the listener to hear the proceedings in the language of his choice, and a bank of translators instantaneously translated all spoken words into the several languages used in the courtroom.

The American chief of counsel was Justice Jackson and his executive trial counsel were Colonel Robert G. Storey and Thomas J. Dodd. The British chief prosecutor was Sir Hartley Shawcross, who had become the Attorney General of Great Britain in the new Atlee government, and his deputy was the former Attorney General, Sir David Maxwell-Fyfe. The chief prosecutor for the Union of Soviet Socialist Republics was General R. A. Rudenko, who subsequently became the Attorney General for the Soviet Union, and his deputy was Colonel Y. V. Pokrovsky. The chief prosecutors for the French Republic were Francois de Menthon and Auguste Champetier de Ribes.

B. The Trial

1. *Evidence*

The logistics of the trial, including the housing and feeding of the personnel involved, and the necessary security measures, were enormous. Evidence had to be found to support the broad charges of the indictment. In some cases this involved literally digging up buried caches of incriminating documents. All this material had to be assembled, translated, evaluated, authenticated and organized for presentation to the Tribunal. Witnesses had to be identified, located in prisoner of war camps or other sites, transported to Nuremberg, and interrogated before being called to the stand. Photographs and films had to be found, authenticated, and prepared for reproduction for the Tribunal. And the necessity for commencement of the trial, without undue delay, compounded these difficulties.

As the time approached for representation of the American case, Justice Jackson was faced with a strategic decision of critical importance: whether to present the affirmative case primarily through the testimony of witnesses, supplemented with documentary proofs, or to offer essentially a case based upon captured German documents, supplemented with oral testimony. General William Donovan, chief of the Office of Strategic Services, advocated the former approach, and Colonel Storey, the latter. Justice Jackson decided that the record would better stand the test of history if every effort were made to prove Nazi crimes through captured Nazi documents. General Donovan withdrew from the case and the trial staff concentrated upon the preparation of briefs based upon written evidence.

2. *Twenty-Four Indicted*

The indictment named twenty-four defendants whose activities covered all aspects of the Nazi regime.[22] The two political leaders, second to Hitler, were Hermann Goering and Rudolf Hess. Chief diplomats were Joachim von Ribbentrop and Franz von Papen. Military leaders were Wilhelm Keitel, Alfred Jodl, Erich Raeder, and Karl Doenitz. Martin Bormann and Alfred Rosenberg were top Party functionaries. Ernst Kaltenbrunner and Wilhelm Frick were responsible for police actions. Robert Ley and Fritz Sauckel were in charge of labor. Albert Speer and Gustav Krupp von Bohlen und Halbach represented armaments and industry. Finance was the principal activity of Hjalmar Schacht and Walter Funk. Baldur von Schirach was the leader of German youth. Occupational commissioners were Constantin von Neurath, Arthur Seyss-Inquart, and Hans Frank. Official propaganda was represented by Hans Fritzsche; anti-Jewish propaganda, by Julius Streicher. Before the trial began von Bohlen was dismissed because of infirmities, and Ley committed suicide. The case proceeded against twenty-two defendants, including Bormann, *in absentia*. In addition, major repressive agencies of the Nazi system were named as criminal organizations: the Reich Cabinet, the Leadership Corps of the National Socialist Party, the SS, the SD, the Gestapo, the SA, and the General Staff of the Armed Forces.[23]

22. Before the individual defendants were selected for trial, three of the principal leaders of Nazi Germany had committed suicide—Hitler and Goebbels in the Bunker of the Reich Chancellery, and Himmler, while in custody of the British. Bormann was killed while attempting to flee from Berlin during its seizure by the Soviets.

23. The SS (*Schutzstaffeln* or Elite Guard), the "Black Shirts," under Heinrich Himmler, was responsible for safeguarding the person of Adolf Hitler and promoting Nazi ideology. The SD (*Sicherheitsdienst* or Security Service) and the Gestapo (*Geheime Staatspolizei* or Secret State Police) were units of the *Reichssicherheits-hauptamt* or Reich Main Security Office under Ernst Kaltenbrunner. The SA (*Sturmabteilung* or Storm Troopers) protected Party meetings and activities under Ernst Roehm, who was assassinated in 1934.

3. *Jackson's Opening Statement*

The trial began on November 20, 1945 with the reading of the indictment. The next morning the twenty defendants then present in court entered pleas of not guilty.[24] There followed one of the foremost forensic speeches in legal history—the Opening Statement for the United States of America delivered eloquently by Justice Jackson:

> The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason.[25]

Justice Jackson turned to the defendants in the dock:

> Merely as individuals, their fate is of little consequence to the world. What makes this inquest significant is that these prisoners represent sinister influences that will lurk in the world long after their bodies have returned to dust. They are living symbols of racial hatreds, of terrorism and violence, and of the arrogance and cruelty of power. They are symbols of fierce nationalisms and of militarism, of intrigue and war-making which have embroiled Europe generation after generation, crushing its manhood, destroying its homes, and impoverishing its life. They have so identified themselves with the philosophies they conceived and with the forces they directed that any tenderness to them is a victory and an encouragement to all the evils which are attached to their names. Civilization can afford no compromise with the social forces which would gain renewed strength if we deal ambiguously or indecisively with the men in whom those forces now precariously survive.[26]

Justice Jackson declared that what the defendants stood for would be patiently and temperately disclosed. "We will give you undeniable proofs of incredible events." And he described the crimes of the Hitler regime as "the fruits of the sinister forces that sit with these defendants in the prisoners' dock."[27]

4. *Problem of the "Victor's Tribunal"*

Justice Jackson acknowledged the problem of credibility posed by trial of the accused before an *ad hoc* tribunal of the victors. "Unfortunately," he observed, "the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes. The world-

24. Kaltenbrunner was absent because of illness. He entered his plea of not guilty when he returned to the courtroom at a later date.

25. *TMWC, supra* note 11, at 99.

26. *Id.*

27. *Id.* at II, 100.

wide scope of the aggressions carried out by these men has left but few neutrals. Either the victors must judge the vanquished or we must leave the defeated to judge themselves. . . ." After referring to the failure of the latter course at the end of World War I, he counseled:

> We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.[28]

Conceding the absence of precedents for this trial of leaders of a defeated state for aggressive war and related crimes, Justice Jackson pointed out that if they were the first war leaders of a defeated nation to be prosecuted in the name of the law, they were likewise the first to be given a chance to plead for their lives in the name of the law. He conceded that they should be given a presumption of innocence and that the prosecution should accept the burden of proving both criminal acts and the responsibility of the defendants for their commission. He declared that the prosecution had no desire to incriminate the entire German people. Indeed, he added, the German, no less than the non-German, world had accounts to settle with the defendants.

5. *Applicable Law and Evidence*

Justice Jackson declared that it would be his purpose to outline the common plan or conspiracy by which the defendants sought to attain their criminal purposes, and not to examine the criminality of the individual defendants. On the basis of captured German documents then in hand he was able to present, with evidentiary support, a powerful description of the lawless road to power, the consolidation of Nazi power, the battle against the working class, the battle against the churches, crimes against the Jews, terrorism and preparation for war, experiments in aggression, wars of aggression, the conspiracy with Japan, and crimes committed in the conduct of the war.

In opening his discussion of the law of the case Justice Jackson asserted, "The Charter of this Tribunal evidences a faith that the law is not only to govern the conduct of little men, but that even rulers are, as Lord Chief Justice Coke put it to King James, 'under God and the law.' "[29] And he declared that the provisions of the Charter were binding upon those who accepted the duty of judging or prosecuting under it, as well as upon the defendants who could point to no other law giving them a right to be heard at all. He argued that the defendants should not be heard to complain

28. *Id.* at 101.
29. *Id.* at 143.

that the Charter was unjust because enacted after the alleged crimes were committed since, as would be shown, they had acted in open defiance of principles of international law pre-dating the Charter.

With respect to the charge of waging aggressive war, Justice Jackson pointed to the Kellogg-Briand Pact of 1928, and other international agreements outlawing war and branding aggressive war as criminal, and he referred to a provision of the Weimar Constitution that declared generally accepted rules of international law as integral parts of the law of the German Reich. But even if the Charter did state new principles of international law, Justice Jackson declared that he would not shrink from demanding its strict application by the Tribunal, for, he said, "I cannot subscribe to the perverted reasoning that society may advance and strengthen the rule of law by the expenditure of morally innocent lives but that progress in the law may never be made at the price of morally guilty lives."[30]

He continued:

> It is true that we have no judicial precedent for the Charter. But International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties and agreements between nations and of accepted customs. Yet every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has the right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law.[31]

Justice Jackson noted that the Charter declared that an accused could not take refuge in the assertion that his actions were pursuant to superior orders or were those of a head of state. He declared that these twin principles had previously provided immunity for practically everyone concerned in the really great crimes against peace and mankind. Those in the lower ranks were protected against liability by the orders of their superiors, and their superiors were protected because their orders were called acts of state. He observed that modern civilization puts unlimited weapons of destruction in the hands of men, and cannot tolerate so vast an area of legal irresponsibility.

Justice Jackson did not contend that judicial remedies alone could prevent future wars, but he urged the importance of holding statesmen responsible to the law. "And let me make clear," he added, "that while this law is first applied against German aggressors, the law includes, and if it

30. *Id.* at 147.
31. *Id.*

is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgment."[32]

He concluded his address with this magnificent peroration:

> The real complaining party at your bar is Civilization. In all our countries it is still a struggling and imperfect thing. It does not plead that the United States, or any other country, has been blameless of the conditions which made the German people easy victims to the blandishments and intimidations of the Nazi conspirators. But it points to the dreadful sequence of aggressions and crimes I have recited. It points to the weariness of flesh, the exhaustion of resources, and the destruction of all that was beautiful or useful in so much of the world, and to greater potentialities for destruction in the days to come. It is not necessary among the ruins of this ancient and beautiful city, with untold members of its civilian inhabitants still buried in its rubble, to argue the proposition that to start or wage an aggressive war has the moral qualities of the worst of crimes. The refuge of the defendants can be only their hope that International Law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law. Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance. It does not expect that you can make war impossible. It does expect that your juridical action will put the forces of International Law, its precepts, its prohibitions, and, most of all, its sanctions, on the side of peace, so that men and women of good will in all countries may have 'leave to live by no man's leave, underneath the law.'[33]

Following his opening speech, and those of the other chief prosecutors, Justice Jackson directed the introduction of evidence by the various members of his staff on the common plan, individual defendants, and indicted organizations. The British followed with evidence of the initiating and waging of wars in violation of international treaties, agreements and assurances; the French offered proof of war crimes and crimes against humanity in the West; and the Soviets submitted evidence of war crimes and crimes against humanity in the East. At the conclusion of the prosecution's case, the defendants offered rebutting evidence, and all, save Rudolf Hess and Wilhelm Frick, testified in their own behalf.[34]

32. *Id.* at 154.

33. *Id.* at 154-55.

34. Schacht and von Papen convinced the Tribunal that they had no active role in the conspiracy after November 5, 1937 when Hitler first disclosed his intention to seize territory in Europe by force. The evidence showed that Fritzsche held only a minor position in the regime. Other defendants generally professed ignorance of the vicious crimes of the tyranny, or pleaded helplessness to prevent their commission.

III. The Cross-Examination of Hermann Goering[35]

A. Goering's Goals and Appearance before the Tribunal

Hermann Wilhelm Goering sat in the first seat of the first row of the defendants' box. The tunic which he wore hung loosely about his body, for he had lost much weight after his capure. Drugs, which had become habitual, had been taken from him, and his mind had regained clarity. No longer a dilettante, he found again the audacity and cunning which had enabled him to rise to a position of highest authority in Nazi Germany, second only to the Fuehrer himself. He was considered the leader among the defendants.

Unlike Jackson, whose task was manifold, involving the entire Nazi conspiracy, and embracing many individual and organizational defendants, Goering had only one mission to serve at Nuremberg—the defense of his personal role in the Hitler regime. With full knowledge that his prominent position could result in no verdict other than guilty and no sentence other than death, Goering, in his direct testimony, sought to: (1) admit his full participation in and support of the Nazi movement, including the Hitler dictatorship, as an indispensable means of restoring order, prosperity, and pride to Germany; (2) acknowledge his contribution in building and directing the Luftwaffe and in bringing into a Greater Germany the Germanic peoples of Europe; (3) affirm his loyalty, as a soldier, to Hitler's orders for war despite any personal reservations; and (4) deny complicity in any of the sordid crimes of the regime, including the attempted genocide of the Jews.

When he took the stand in his own behalf, therefore, to answer the questions of his counsel, Dr. Otto Stahmer, Goering displayed confidence and bravado. It was his last chance to speak for himself and for the regime which he had served. He sought to justify the many decorations which had been bestowed upon him and which he had worn so proudly in days of triumph. Testifying in his own behalf afforded him the last and best chance to convince the German people of Germany's righteous rebellion against a hostile world.

Goering told of meeting Adolf Hitler in Munich in the days of the formation of the Nazi Party, of his participation in the 1923 Putsch, its

35. The author assisted Justice Jackson in court throughout the cross-examination of Goering, and had a primary responsibility for obtaining, analyzing, and organizing for presentation to the witness incriminating documents, some of which became available even as the examination progressed. Some historians, insufficiently aware of the difficulties facing Justice Jackson in this opening cross-examination, have undervalued his performance. *E.g.*, B. Smith, Reaching Judgment at Nuremberg at 176 (1977); R. Conot, Justice at Nuremberg at 337–43 (1983).

failure, and his flight abroad.[36] He described his return to Germany and reassociation with Hitler, becoming an early Nazi member of the Reichstag. He admitted his support of the consolidation of the Hitler dictatorship and his personal efforts to strengthen the movement, not for the love of power, he claimed, but for the greatness of Germany. He supported, and took a leading role in, the absorption of Austria. He accepted the invasion of Poland, but he testified that he opposed the attack upon Russia. He ended his testimony defiantly, "And at this point I should like to say the same words which one of our greatest, most important, and toughest opponents, the British Prime Minister, Winston Churchill, used: 'In the struggle for life and death there is in the end no legality.' "[37]

B. Jackson's Cross-Examination: Proving the Common Plan

The cross-examiniation of the "Number Two Nazi" by the leading prosecutor for the Allies was an event eagerly anticipated by the press. Apart from occasional bits of drama, the trial proceeded steadily under a mass of documents piling up evidence against the defendants. By March 18, 1946, when Jackson rose to cross-examine Goering, the media were hungering for the dramatic incidents which would bring the trial once again to the front pages of the newspapers of the world.[38]

But Jackson had a record to protect and a case to prove. This was not a jury trial, and impeachment of the witness was not important. On the contrary, confirmation of the broad outline of the affirmative case was Jackson's objective. And he decided to attempt to prove, from Goering

36. On the evening of November 8, 1923, Hitler, supported by his storm troopers, burst into a political gathering in the Buergerbraukeller in Munich, disrupted the meeting, and proclaimed the Nationalist Revolution. On the next day, Hitler, Ludendorff, and their supporters attempted to march into the center of Munich. At the Feldherrnhalle they were met by a patrol of police and ordered to disband. When they continued to advance, shots were exchanged, and some men were killed on both sides. Hitler fled, and the *putsch* was put down. Hermann Goering was wounded and shortly after escaped abroad. Hitler, Wilhelm Frick, Ernst Roehm, and other leaders were arrested and brought to trial for high treason. Hitler was convicted and sentenced to five years confinement in Landsberg fortress. While there, he dictated *Mein Kampf* to his faithful paladin, Rudolf Hess. In eight months he was set free.

37. *TMWC, supra* note 11, at IX, 364.

38. Media coverage of the trial was the most extensive of any trial in history. In the beginning, each new bit of evidence enabled the press to excite the public. As the trial wore on, however, interest flagged. The press hoped that there would be dramatic incidents in the cross-examination of Goering by Justice Jackson which would revive that interest. After Goering's direct testimony Justice Jackson knew that there would be few surprises. Goering had candidly admitted his leadership responsibilities under Hitler and his loyal and constant support of the Fuehrer. As to specific crimes, he could always blame the dead—Hitler, Goebbels, Himmler, Bormann and Heydrich.

alone, the entire First Count—the Common Plan or Conspiracy—of the Indictment. It was an audacious undertaking, and required that the examination proceed logically, from question to question, and that the witness neither equivocate nor make speeches in amplification of his answers. The cross-examination began as follows:

J. You are perhaps aware that you are the only living man who can expound to us the true purposes of the Nazi Party and the inner workings of its leadership?

G. I am perfectly aware of that.

J. You, from the very beginning, together with those who were associated with you, intended to overthrow, and later did overthrow, the Weimar Republic?

G. That was, as far as I am concerned, my firm intention.

J. And, upon coming to power, you immediately abolished parliamentary government in Germany?

G. We found it to be no longer necessary. Also I should like to emphasize the fact that we were moreover the strongest parliamentary party, and had the majority. But you are correct, when you say that parliamentary procedure was done away with, because the various parties were disbanded and forbidden.[39]

Justice Jackson continued with a line of questions designed to establish the framework of the Nazi conspiracy. He asked whether the leadership principle was established under which authority existed only at the top and was imposed upon the people below, and Goering conceded the point after extended explanation. When Jackson suggested that the Nazis did not permit the election of representatives of the people with authority to act in their behalf, Goering answered, "Quite right," and explained that the only right of the people was to declare themselves in agreement with the Fuehrer.

For several questions, the examination proceeded relatively smoothly, with Justice Jackson making one point after another to establish the basic structure of the Nazi tyrannical system. He asked whether the principles of the authoritarian government which the Nazis set up required that no opposition by political parties could be tolerated, and Goering answered that he had understood this quite correctly. Justice Jackson asked whether the Nazis suppressed all opposition parties in order to maintain power, and Goering responded that they found it necessary not to permit any such opposition. When Justice Jackson suggested that this applied as well to all individual opposition, Goering conceded that individual opposition was not tolerated.

Justice Jackson then asked if it were necessary to have a secret political police to detect opposition, and Goering replied that he considered it

39. *TMWC*, *supra* note 11, at IX, 418.

necessary.[40] But in response to the further question whether concentration camps were established to eliminate opponents, Goering became evasive, until Justice Jackson pressed him to an affirmative response. Goering continued with a long explanation. When he sought even further exposition, Justice Jackson interrupted him and suggested that he omit further discussion in the interest of time. Neither Goering nor his counsel took the slightest offense, since the answer had been fully stated and explained. Yet, before Justice Jackson could pass to the next question, Lord Lawrence intervened from the bench, stating that the Tribunal felt that the witness ought to be allowed to make whatever explanation he thought right in his answer.

By this intended act of fairness to the witness, Lord Lawrence had opened Pandora's box. What had been most feared in allowing the defendants the benefit of a trial was assured: they could make speeches in the course of explaining their answers upon cross-examination, offering propaganda in place of fact. Goering took immediate advantage of the ruling. When Justice Jackson asked whether protective custody meant that people were taken into custody who had not committed any crimes but who, the authorities thought, might commit a crime, Goering replied affirmatively and then added, "just as extensive protective measures are being taken in Germany today on a tremendous scale."[41]

Justice Jackson next turned to the repressive agencies of the regime, gaining Goering's admission that the Gestapo carried out executions during the Night of Long Knives—the Roehm Putsch—and that the SS served as the executioner of the Nazi Party.[42] Justice Jackson suggested that there was nothing secret about the establishment of the Gestapo as a political police, or that people were taken into protective custody and sent to concentration camps, and Goering conceded that there was at first nothing secret about it at all. When Justice Jackson inquired if Goering believed that that was the proper type of government for Germany, Goering declared that under the conditions existing at that time, in his opinion, it was the only possible form.

Having shown, through Goering's admissions, the tyrannical structure of the Hitler regime, Justice Jackson turned next "to the fruits of this system." He inquired whether because of the Fuehrer system, the attack was made upon the Soviet Union in 1941 despite Goering's personal

40. The Gestapo, or *Geheime Staatspolizei,* was first established in Prussia by Hermann Goering, as Minister President, shortly after Hitler was named Chancellor.

41. *TMWC, supra* note 11, at IX, 422. The remark was irrelevant and improper.

42. On the night of June 30, 1934, with the support of the Gestapo and SS, Hitler directed the elimination of Ernst Roehm and other leaders of the SA, together with remaining potential opponents, such as former Chancellor General von Schleicher, in an orgy of murder and savagery.

opposition and without public participation or knowledge. Goering responded: "The German people did not know about the declaration of war against Russia until after the war with Russia had started. The German people, therefore, had nothing to do with this. The German people were not asked; they were told of the fact and the necessity for it."[43] And when asked why the war was continued after it was clear that Germany would be defeated, at the cost of the devastation of German cities and populace, Goering testified that as long as Hitler was the Fuehrer of the German people, he alone decided whether the war was to continue. Goering asserted that, despite Hitler's accusations of disloyalty, he never thought for a minute of taking over power illegally or of acting against the Fuehrer in any way.

Justice Jackson gained the admission of Goering that prior to the Reichstag fire of February 27, 1933, lists of Communist functionaries had been drawn up, and that arrests were made from those lists immediately following the fire. Goering acknowledged that on the day after the fire, less than a month after Hitler had taken power, President von Hindenburg had been persuaded to suspend the bill of rights of the German constitution, enabling the regime to strike against all political opponents without legal restraints. He denied accusations of those who implicated him personally in the burning of the Reichstag.[44]

Goering did admit his personal support of the Night of Long Knives, claiming that Ernst Roehm, as chief of the SA, planned to overthrow the Government,[45] and Hitler had decided to nip the revolt in the bud. Goering freely admitted that there were those that night who were "quite wrongfully shot."

As head of the Four Year Plan, Goering gradually usurped Schacht's position and power as the architect of the German economy. Goering admitted that on December 18, 1936 he had written to Schacht that Goering's task as head of the Four Year Plan was to put the entire economy in a state of readiness for war within four years, or by 1940; despite the opinion of the Commander-in-Chief of the Armed Forces, Marshal von Blomberg, on June 24 of the following year, that Germany need not expect an attack from any side. Nor did Goering deny that he had stated at a

43. *TMWC, supra* note 11, at IX, 429.

44. A tunnel connected Goering's residence with the Reichstag. Goering was accused by Roehm's chauffeur of having arranged the burning of the Reichstag as an incident to justify widespread arrests of Communists shortly after the Nazis took power. He was further implicated by Hermann Rauschning and General Franz Halder. The fire was set by a half-witted Dutch Communist, Van der Lubbe, and it was suggested that the arsonist was incited to the crime by the Nazis.

45. The issue was not so much Roehm's loyalty as Hitler's decision to subordinate the SA to the army.

meeting of the Reich Defense Council on November 18, 1938 that it was the task of the Council to correlate all the forces of the nation for the accelerated build up of German armaments.[46]

Goering acknowledged that minutes of the Working Committee of the Reich Defense Council on June 26, 1935 had stated that preparations for mobilization must be kept in strictest secrecy in the demilitarized zone as well as in the rest of the Reich. Justice Jackson suggested that this referred to preparations for the forthcoming armed reoccupation of the Rhineland. When Goering replied that it related only to general preparations for mobilization, Justice Jackson observed that they were of a character which had to be kept entirely secret from foreign powers, whereupon Goering sneered: "I do not think I can recall reading beforehand of the publication of the mobilization preparations of the United States."[47]

The answer was impudent. Jackson charged the witness with adopting an arrogant and contemptuous attitude toward the Tribunal and renewed his plea that Goering be instructed to answer questions categorically and reserve his explanations for redirect examination. But Lord Lawrence declared that he had already laid down the general rule and adjourned the session.

Justice Jackson renewed his motion the following day. Justice Lawrence seemed unable to understand the purpose and merit of the requested ruling. "Are you asking the Tribunal to strike the answer out of the record?" he inquired.[48]

Of course, the propaganda effect of the improper answer could not be prevented by such a ruling, as Justice Jackson pointed out: "I trust the Court is not unaware that outside of this courtroom is a great social question of the revival of Nazism and that one of the purposes of the Defendant Goering—I think he would be the first to admit it—is to revive and perpetuate it by propaganda from this Trial now in process."[49] Yet, Justice Lawrence, without reference to his fellow-jurists, simply renewed his previous order that the witness should first respond categorically and then make such explanation as he desired. The ruling appeared to the media as a triumph of the witness over the prosecutor—in fact, it was a license to propagandize conferred on the witness by the President of the Tribunal.

When Justice Jackson turned to Goering's actions against the Jews, the witness became considerably less defiant. The prosecutor was fortified

46. Justice Jackson impeached Goering with this cross-examinaton, for on direct, Goering had testified that he had never participated in a meeting of the Reich Defense Council.

47. *TMWC, supra* note 11, at IX, 507.

48. *Id.* at 510.

49. *Id.* at 511.

with documentary evidence which Goering could not evade. Goering freely admitted that from the very beginning he "regarded the elimination of the Jews from the economic life of Germany as one phase of the Four Year Plan."[50] Goering did not deny that he proclaimed the anti-Jewish decrees promulgated at Nuremberg in 1935, the 1936 law prescribing the death penalty for Germans transferring property abroad, the 1938 act publishing penalties for veiling the character of Jewish enterprises, a decree of 1939 limiting competence of the courts to handle penalties against Jews, and a 1938 decree providing for registration of Jewish property and requiring that disposal of Jewish enterprises be subject to permission by the authorities. When asked if in 1938 he signed a decree that Jews could no longer own retail stores, he answered: "Yes. Those are all parts of the decrees for the elimination of Jewry from economic life."[51]

Justice Jackson then turned to one of the primary documents implicating Goering in the Nazi plan for extermination of the Jews. This was an order of July 31, 1941 to SS Gruppenfuehrer Heydrich, Chief of the Security Police and SD, charging him "with making all necessary preparations in regard to organizational and financial matters for bringing about a complete solution of the Jewish question in the German sphere of influence in Europe."[52] Heydrich responded by sending special task forces of the Gestapo and SD into the occupied Eastern Territories, the Einsatzgruppen, with the mission of exterminating Jews in the field, while Himmler was ordering Rudolf Hoess to establish the mass murder facility at Auschwitz, Poland.

Justice Jackson confronted Goering with documents relating to the November 9–10 pogrom against the Jews of Germany.[53] Heydrich had provided him with detailed accounts of the killing of Jews, that night, and the destruction of Jewish property. All offenses were placed under the control of the Party courts, rather than the ordinary courts, and Goering admitted that only minor punishments were pronounced for killing Jews. Goering concurred with the observation that "the public down to the last man realizes that political drives, like those of 9 November, were organized and directed by the Party."[54]

50. *Id.* at 515.

51. *Id.* at 517.

52. *Id.* at 519. Reinhard Heydrich was shot in Prague on May 27, 1942 by Jan Kubis and Josef Gabcik, who were serving with the Free Czechs in Britain and were sent to Prague to assassinate him. Heydrich died on June 4, 1942. In reprisal, the entire village of Lidice was destroyed.

53. This vicious anti-Jewish pogrom was in retaliation for the assassination on November 7, 1938 of Ernst vom Rath, a third secretary in the German embassy in Paris, by a seventeen-year-old Polish Jewish student, Hershl Grynszpan, whose parents had been expelled from Germany. During the pogrom Jewish stores were damaged, synagogues were burned, homes were invaded, and thousands of Jews were sent to concentration camps.

54. *TMWC, supra* note 11, at IX, 525.

Justice Jackson then turned to minutes of a meeting of November 12, assessing the results of the pogrom. Goering called the meeting and presided over it. He began by noting that he had received a letter from Bormann, on orders of the Fuehrer requesting that "the Jewish question" be now, once and for all, coordinated and solved. Goering commanded the competent departments "to take trenchant measures for the Aryanizing of the German economy." The document reported a vicious dialogue between Goering and Goebbels on the banning of Jews from public places. Goering ordered that all insurance claims arising from the pogrom be paid to the Minister of Finance, rather than to the injured parties. When it was pointed out that most of the goods in damaged stores were on consignment from other firms, some of which were Aryan, Goering complained, "I wish you had killed 200 Jews instead of destroying such valuables."[55]

In concluding his cross-examination on this issue, Justice Jackson asked whether toward to the close of the meeting Goering had said the following: "I demand that German Jewry as a whole shall, as a punishment for their abominable crimes, *et cetera,* make a contribution of 1,000,000,000 marks. That will work. The pigs will not commit a second murder so quickly. Incidentally, I would like to say again that I would not like to be a Jew in Germany." To which Goering responded: "That was correct, yes."[56]

Justice Jackson impeached or forced admissions from Goering through captured German documents. He cross-examined Goering at length upon the building of his huge art collection from confiscated works of art. Goering admitted visiting an exhibition of Jewish art treasures at the Jeu de Paume in Paris on February 5, 1941, where he made a selection of those works of art which were to go to the Fuehrer and those which were to be placed in his own collection.

One of the war crimes charged to the defendants was the utilization of prisoners of war for forced labor. Justice Jackson inquired whether Goering "gave the directives for the employment of Russian prisoners of war . . . for war industry—tanks, artillery pieces, airplane parts?" Goering answered, "that is correct," and he bragged that "the forced labor program was effective."[57]

Goering had testified on direct examination that he had never taken anything, not even so much as a screw or a bolt, when in occupation of foreign territory. But when confronted by Jackson with a secret command of September 7, 1943, calling for the removal of all agricultural products, means of production and machinery of enterprises serving the agriculture and food industry, he confessed that it was "absolutely correct."

55. *Id.* at 538.
56. *Id.* at 544.
57. *Id.* at 555.

Justice Jackson confronted Goering with the minutes of a meeting with Hitler on January 27, 1945 concerning the disposition of 10,000 captured Allied airmen held in a camp near Sagan who were in line of rescue by advancing Soviet forces. It was agreed that they should be taken from the camp, as Hitler said, "even if they have to go on foot." Goering gibed: "Take their pants and boots off so that they cannot walk in the snow."[58]

Justice Jackson referred the witness to a report from Terboven, the Reichskommissar for Norway, stating that in retaliation for actions of a Norwegian resistance group the entire village which had harbored the unit was burned down and the men sent to a German concentration camp, the women to a Norwegian labor camp, and the children to a children's camp. Despite this atrocity, Goering acknowledged that Terboven was retained in his post for another three years. Goering likewise admitted issuing an order calling for forced labor of inhabitants in areas of guerrilla activity, with separate camps "for the children."

Despite his inability to obtain support of the Tribunal in confining the witness to direct responses, devoid of propagandistic irrelevancies,[59] Jackson succeeded in his basic objective of compelling the principal Nazi defendant to acknowledge the common plan to wage aggressive war and commit related crimes, as well as the commission of specific atrocities. In the first part of the examination Justice Jackson established, through Goering's admissions, the rise to power of the Hitler tyranny, the conspiracy to seize absolute control of the nation, the involvement of criminal organizations in the enterprise, the preparations for war, and the waging of wars of aggression. In the last part, he proved the participation of Goering in the worst crimes of the regime, including the vicious persecution of the Jews, theft of Jewish art treasures and property, utilization of captured soldiers for forced labor, reprisals against villages and their inhabitants, and despoliation of occupied territories. Goering left the stand, as he well knew, doomed by his response to Justice Jackson's interrogation.[60]

58. *Id.* at 560.

59. The British associate judge, Sir Norman Birkett, acknowledged in his diary the failure of the Tribunal to retain control of the proceedings. "Goering was allowed to make long statements in reply to almost every question. . . ." M. HYDE, NORMAN BIRKETT at 511, (1964). And the British chief prosecutor, Sir Hartley Shawcross, commented upon the "weakness of the Tribunal in allowing excess latitude to Goering" against which Jackson protested "in vain." *Robert H. Jackson's Contributions During the Nuremberg Trial,* 23 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK at 420 (1968). (Hereinafter cited as Record).

60. At the end of the examination Sir David Maxwell-Fyfe, the British deputy chief prosecutor, congratulated Justice Jackson on having successfully proved, through Goering, the entire conspiracy charge.

IV. Final Address and Judgment

Justice Jackson commenced his final address to the Tribunal with a warning and a prophecy—a warning yet to be heeded by world leaders—a prophecy awaiting the end of this century:

> It is common to think of our own time as standing at the apex of civilization, from which the deficiencies of preceding ages may patronizingly be viewed in the light of what is assumed to be "progress." The reality is that in the long perspective of history the present century will not hold an admirable position, unless its second half is to redeem its first. These two-score years in the Twentieth Century will be recorded in the book of years as one of the most bloody in all annals. Two World Wars have left a legacy of dead which number more than all the armies engaged in any war that made ancient or medieval history. No half-century ever witnessed slaughter on such a scale, such cruelties and inhumanities, such wholesale deportations of peoples into slavery, such annihilations of minorities. The terror of Torquemada pales before the Nazi Inquisition. These deeds are the overshadowing historical facts by which generations to come will remember this decade. If we cannot eliminate the causes and prevent the repetition of these barbaric events, it is not an irresponsible prophecy to say that this Twentieth Century may yet succeed in bringing the doom of civilization.[61]

Justice Jackson first discussed the status of the International Military Tribunal, stressing that it was a continuation of the war effort of the Allied nations, and was not bound by the procedural and substantive refinements of their respective judicial or constitutional systems, deriving its authority not only from international law but likewise from basic principles of jurisprudence which are assumptions of civilization embodied in the codes of nations.

In developing the argument on the first count of the Indictment—the Conspiracy Count—Justice Jackson declared that the pillars upholding the charge were in five groups of overt acts: (1) seizure of power and conversion of Germany to a police state; (2) preparation and waging of wars of aggression; (3) warfare in disregard of international law; (4) enslavement and plunder of populations in occupied territories; and (5) persecution and extermination of Jews and Christians. In bringing these several groups of criminal acts together as parts of a single conspiracy Jackson contended that the central crime in the pattern was the plot for aggressive wars, and he destroyed the defense with a simple question: "Were they preparing for the war which did occur, or were they preparing for some war which never has happened?"[62]

Justice Jackson reminded the Tribunal that as early as 1923, in *Mein Kampf*, Hitler had declared his intention to attack neighboring states and

61. *TMWC, supra*, note 11, at XIX, 397.
62. *Id.* at 406.

seize their lands, to be won by "the power of a triumphant sword." He described the consolidation of political power after Hitler's appointment as Chancellor in 1933, and the steps taken to prepare the nation for war, culminating in Goering's order in 1936 that all measures were to be considered from the standpoint of "an assured waging of war."

By November 5, 1937, the plan of attack had taken definiteness as to time and victim. Hitler declared that the question for Germany was where the greatest possible conquest could be made at the lowest possible cost. He discussed plans for the invasion of Austria and Czechoslovakia, stating that the objective was the acquisition of additional living space in Europe and warning that this could be gained only by force. By May of 1939 Hitler confided to his co-conspirators his intention "to attack Poland at the first suitable opportunity." Justice Jackson argued that henceforward the Nazis prepared not as before for *a* war, but for *the* war, and concluded: "The dominant fact which stands out from all the thousands of pages of the record of this Trial is that the central crime of the whole group of Nazi crimes—the attack on the peace of the world—was clearly and deliberately planned."[63]

After setting forth the position of each defendant in the conspiracy, Justice Jackson responded to the argument that in an absolute dictatorship only the dictator, in this case Adolf Hitler, can be held accountable because all others were bound to follow his supreme orders. This contention, Justice Jackson pointed out, overlooked the fact that it was the defendants who placed Hitler in his position of absolute power and who supported and abetted his actions as dictator: "The defendants may have become the slaves of a dictator, but he was their dictator. . . . His guilt stands admitted, by some defendants reluctantly, by some vindictively. But his guilt is the guilt of the whole dock, and of every man in it."[64]

Justice Jackson closed his argument—and the American case—with this dramatic summation:

> It is against such a background that these defendants now ask this Tribunal to say that they are not guilty of planning, executing, or conspiring to commit this long list of crimes and wrongs. They stand before the record of this Trial as bloodstained Gloucester stood by the body of his slain king. He begged of the widow, as they beg of you: 'Say I slew them not.' And the Queen replied, 'Then say they were not slain. But dead they are. . . .' If you were to say of these men that they are not guilty, it would be as true to say that there has been no war, there are no slain, there has been no crime.[65]

The Judgment of the International Military Tribunal was handed down on October 1, 1946. Of the twenty-two individual defendants, three—

63. *Id.* at 418.
64. *Id.* at 424.
65. *Id.* at 432.

Schacht, von Papen, and Fritzsche—were acquitted, twelve were sentenced to death by hanging, and seven were given varying terms of imprisonment.[66] The Tribunal declared as criminal organizations, the Leadership Corps of the Party, the Gestapo, the SS, and the SD.

The Tribunal followed and applied the legal principles laid down in the Charter for which Justice Jackson had fought so inflexibly at the London Conference, and declared them binding upon the Tibunal as the law of the case. It held that waging aggressive war is an international crime for which heads of state may be held personally accountable. It approved and applied the laws of war, and held that the Tribunal had jurisdiction over crimes against humanity committed in the course of an illegal war. It rejected the plea of superior orders as a defense to these crimes. And, finally, it held that persons charged with crime under international law are entitled to a fair trial, with a presumption of innocence which may be overcome only by evidence establishing guilt beyond a reasonable doubt. In short, the Tribunal declared and applied the rule of law to hitherto lawless conduct, confirming the principles which Justice Jackson had urged so determinedly at London and had developed so brilliantly at Nuremberg.

V. Justice Jackson's Legacy of Law

The legacy of the Nuremberg Trial is a law-ordered world in which nations live at peace. It is not the fault of Justice Jackson, nor of those associated with him at Nuremberg, that this legacy has not yet achieved tranquillity in the troubled post-war period. If Nuremberg had not occurred, and the anger of the Allies had been assuaged by execution of alleged war criminals without trial, world society would not have advanced an iota toward peace under law. Because of Jackson's visionary concept of the law of nations, Nuremberg provides at least the hope of a world without war.[67]

66. Goering cheated the hangman by taking poison shortly before midnight on October 15, 1946. The others who received death sentences were hanged in the early hours of October 16, in the prison of the Palace of Justice where they had stood trial. Their bodies were cremated and the ashes cast into the River Isar and washed away to sea.

67. In addition to the Nuremberg precedent, there is a body of law that gives further support to its principles. *E.g.*, Treaty Providing for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), done at Paris, Aug. 27, 1928, entered into force for the United States, July 24, 1929, 46 Stat. 2343, T.S. No. 796, 2 Bevans 732, 94 U.N.T.S.; Resolution of U.N. General Assembly, Dec. 10, 1946, affirming law of the Charter and Judgment of the IMT; Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the U.N. General Assembly, Dec. 9, 1948, entered into force, Jan. 12, 1961, 78 U.N.T.S. 277, to which the United States became a party in 1986.

Other initiatives have been launched as well. For example, in August 1951 the Committee on International Criminal Jurisdiction composed of representatives of seventeen member states of the United Nations submitted a draft statute to the General Assembly calling for an international criminal court to try persons accused of crimes under international law. An Inter-

It stands firmly against the resignation of man to the inhumanity of man. Because of Nuremberg—and the effort which it represents of man's attempt to elevate justice and law over inhumanity and war—there is hope for a better tomorrow.

As the Twentieth Century draws to a close let us recall these words of Justice Jackson: "If mankind really is to master its destiny or control its way of life, it must first find means to prevent war."[68]

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national Court of Justice in civil cases, would eliminate the criticism of trial by *ad hoc* tribunals of victors after future wars. Such a tribunal might be given jurisdiction over piracy, as well as aggressive war and related crimes. Perhaps international terrorism and genocide could also be brought within the jurisdiction of such a tribunal.

It is paradoxical that the most devastating weapon ever devised by man for use in war may have done more to keep peace among the great powers in the latter half of this century than the Nuremberg pronouncements condemning aggressive war as the supreme international crime. Fear of the nuclear bomb seems to surpass respect for law in these troubled times. In the long course of history, however, it must be the latter principle which prevails, for a lawless world will ultimately become a lifeless world.

68. W. HARRIS, *supra* note 2, at 568.

No man, in our times, has done more than Justice Jackson to replace the scourge of war with the power of law. As Lord Schawcross has written, ". . . in the pages of history, Justice Jackson will long be remembered for the leading part he played in promoting the growth of international law through the process at Nuremberg." RECORD, *supra* note 59 at 397.